STATE OF MICHIGAN

COURT OF APPEALS

JOYCE ANN LEWIS GAGNON, Plaintiff-Appellee,	UNPUBLISHED April 3, 2003
v THOMAS L. STANLEY, Defendant-Appellant.	No. 235217 Oakland Circuit Court LC No. 98-011364-PS
JOYCE ANN LEWIS GAGNON, Plaintiff-Appellee,	
v THOMAS L. STANLEY, Defendant, and BROWN AND STANLEY, PC, Garnishee-Defendant-Appellant.	No. 238380 Oakland Circuit Court LC No. 1983-266903-NM

Before: Saad, P.J., and Zahra and Schuette, J.J.

PER CURIAM.

Defendant appeals as of right an order renewing a 1988 judgment against him, and garnishee appeals as of right an order requiring it to satisfy the renewed judgment. These appeals were consolidated on October 31, 2002. We affirm.

I. Facts

In 1979, plaintiff retained Thomas L. Stanley to represent her in an employment discrimination case. Plaintiff was unsuccessful in her case and sued defendant Stanley for

malpractice. In 1988, plaintiff received a judgment in the amount of $6,750, plus interest and costs, against defendant Stanley.

Plaintiff made several unsuccessful attempts to collect her judgment. Ultimately, in January, 2000, the trial court issued an order renewing the 1988 judgment against defendant Stanley. In November, 2001, the lower court issued a judgment pursuant to MCR 3.101(O) ordering garnishee defendant Brown and Stanley, PC, (defendant Stanley's law firm) to pay plaintiff $48,912.07 to satisfy the renewed malpractice judgment.

II. Analysis

A. Service of Process

Defendant's arguments are primarily premised on his interpretation of MCL 600.5856(c), which tolls the period of limitations when a complaint is filed and a copy of the summons and complaint are delivered to an officer for service. However, a plaintiff commences a civil action when he files a complaint. MCR 2.101(B); MCL 600.1901. Tolling is not required and the tolling requirements are therefore irrelevant when the complaint is filed within the period of limitations. *Buscaino v Rhodes*, 385 Mich 474, 481; 189 NW2d 202 (1971); *Terrace Land Development Corp v Seeligson & Jordan*, 250 Mich App 452, 460-461; 647 NW2d 524 (2002). The tolling provision, MCL 600.5856(c), becomes relevant only when the complaint is dismissed and the plaintiff attempts to file a new complaint; the period of limitations is tolled while the first suit is pending. *Buscaino*, *supra* at 481-482. See also, e.g., *Dorsey v Kasyonan*, 193 Mich App 711, 714-715; 484 NW2d 415 (1992).

B. Statute of Limitations

Plaintiff filed her complaint within the ten-year period of limitations for actions on judgments, MCL 600.5809. Therefore, the trial court did not err when it found that plaintiff's action was timely. Further, the trial court properly denied defendant's request for an evidentiary hearing regarding the date of delivery to the process server because that date was inconsequential.

Defendant also argues that the period of limitations ran because the complaint was dismissed and then later reinstated, apparently due to court error. Defendant's argument might have merit, had plaintiff filed a new complaint after the period ran. However, reinstatement is treated differently. See *Andrews v Allstate Ins Co*, 479 F Supp 481, 485 (ED Mich, 1979), cited with approval in *Sanderfer v Mt Clemens General Hospital*, 105 Mich App 458, 462; 306 NW2d 322 (1981). A reinstated complaint relates back to the original complaint. See *Goniwicha v Harkai*, 393 Mich 255, 255-256; 224 NW2d 284 (1974).

Finally, defendant argues the trial court erred by denying defendant's motion for reconsideration which sought an evidentiary hearing to determine whether defendant was served. Under MCR 2.119(F)(3), reconsideration is appropriate if a party shows a palpable error that misled the parties; however, a trial court does not abuse its discretion by denying reconsideration when the issue could have been raised earlier, *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Further, under MCR 2.116(D)(1), a defendant waives any issue regarding sufficiency of service if he does not raise it in his first responsive pleading. Defendant

failed to timely raise the issue of service. The trial court did not abuse its discretion when it denied defendant an evidentiary hearing on an issue that should have been raised earlier.

Further, even on appeal defendant does not directly assert that he was not served. Rather, he relies only on the failure to notarize the affidavit of service. Failure to file a proper proof of service does not make the service automatically invalid. MCR 2.104(B). If a defendant receives a copy of the summons and complaint, he cannot have the action dismissed for improper service. *Hill v Frawley*, 155 Mich App 611, 613; 400 NW2d 328 (1986), citing MCR 2.105(J)(3). There is no evidence defendant did not receive the summons and complaint.

The trial court did not err when it renewed the judgment against defendant and denied defendant's motion for reconsideration.

C. Garnishment Issues

Garnishee's erroneously contends that plaintiff failed to timely renew the judgment. Garnishee also argues, however, that the writ of garnishment was invalid because it was issued before the trial court decided the motion for reconsideration. The trial court explained that it did not decide the motion until more than a year after it was filed because it did not receive a judge's copy and therefore was unaware of the motion.

In its brief, garnishee erroneously relies on MCR 7.101(H)(1)(a), which applies only to appeals to the circuit court. Another court rule, MCR 2.614(A)(1), prohibits execution of a judgment until twenty-one days after an order on "a motion for new trial, a motion to alter or amend the judgment, a motion for judgment notwithstanding the verdict, or a motion to amend or for additional findings of the court" if the motion was filed and served within twenty-one days after the judgment was entered. However, we decline to decide whether the writ of garnishment violated that provision because garnishee failed to preserve this issue for appeal by raising it in the trial court, *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997), and, further, failed to include it in the statement of the question presented, MCR 7.212(C)(5); *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999).

Garnishee also argues that the judgment against it was improper because the writ of garnishment had expired. Garnishee says that the writ was no longer in effect ninety-one days after it was issued MCR 3.101(B)(1)(a)(ii), and that after the stay was lifted, the writ was no longer in effect. However, garnishee was required to begin garnishment the first full pay period after the writ was served on the garnishee and continue until the writ was stayed. MCR 3.101(I). Garnishee was also required to file with the trial court a final statement of the amount payable. MCR 3.101(J)(6). Garnishee failed to make any payments or file a final statement.

The trial court issued a judgment against garnishee for the full amount under MCR 3.101(O). Contrary to garnishee's assertions on appeal, this was not a default judgment. A judgment under MCR 3.101(O) may extend beyond any writs of garnishment, if warranted by the facts. The only limitation is that the judgment cannot exceed the underlying judgment, plus interests and costs. MCR 3.101(O)(1). The judgment discharges the garnishee from all demands by the defendant for the money, and the garnishee may introduce the judgment and satisfaction

as evidence if the defendant sues. MCR 3.101(O)(2). Here, the judgment against garnishee was warranted by the facts.

Finally, because this was not a default judgment, the requirements of MCR 3.101(S)(1) and MCR 2.603(B)(3)(b) do not apply. Garnishee admitted its obligation to defendant in its disclosure, MCR 3.101(M)(2), (3); *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 309; 486 NW2d 351 (1992), and no other proof of the underlying debt was required save the existence of the order renewing the judgment. The trial court did not err when it ordered garnishee to pay plaintiff $48,912.07 to satisfy the renewed judgment.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette